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March 21, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace

Dear Mr. Secretary:

These comments are submitted by email to adr@ftc.gov by the Council of Better Business Bureaus, Inc. (CBBB) and BBBOnLine, Inc. (BBBOnLine®). We respectfully request an opportunity to participate in the upcoming workshop to be conducted by the Commission and the Department of Commerce. If invited to participate, we would designate as panelist either Charles Underhill, CBBB Senior Vice President or Steven J. Cole, CBBB and BBBOnLine Senior Vice President and General Counsel.

BACKGROUND

CBBB represents 132 member Better Business Bureaus throughout the United States and 15 Bureaus in Canada. The Better Business Bureau (BBB) system has more than 270,000

local business members and over 300 leading-edge national and multi-national corporate members. CBBB's mission is to promote the highest ethical relationship between businesses and the public through self-regulation, consumer and business education, and service excellence.

BBBOnLine is a subsidiary corporation of CBBB that was created in 1995 to help fulfill CBBB's mission in the online marketplace, and thereby to build consumer trust and confidence in the vast and constantly evolving Internet. BBBOnLine's Board of Directors represents leading technology, consumer product, marketing and content provider companies with a strong interest in the success of e-commerce. BBBOnLine operates two of the most successful self-regulation programs on the Internet ("reliability" program and "online privacy" program), both of which feature dispute resolution as crucial components.

Since the first Better Business Bureaus were organized in 1912, the BBB system has played an important role in pioneering dispute resolution in the consumer/business arena. In addition to extensive use of Alternative Dispute Resolution (ADR) for consumer disputes generated in the "brick and mortar" world, the CBBB and BBBOnLine have made ADR a critical component of an effective self-regulatory approach to consumer protection in the online environment.¹

With its lengthy and focused experience in consumer dispute resolution programs, CBBB is in a unique position to provide significant input and guidance on this critical subject.

Existing Alternative Dispute Resolution Programs

1) What types of ADR are there? Are certain types better suited for online transactions?

The FTC and Department of Commerce note that a number of different mechanisms currently exist to resolve disputes involving online transactions. Some of these are sponsored by courts or otherwise publicly funded; others are services offered by private, non-profit groups; and still others follow a private, entrepreneurial model. Some of the mechanisms offer online methods of resolving disputes, whether or not those disputes arose online. Many of these mechanisms are targeted most specifically toward business-to-business transactions, since the dollar value of these disputes and the relative sophistication of the parties and their advocates creates a positive cost/benefit analysis for the use of formal ADR processes.

There are almost as many "types" of ADR as there are categories of disputes waiting to be resolved. These run the gamut from very simplified forms of "assisted facilitation" (where a third party may briefly touch a dispute to nudge it in the

¹ See June, 1999 testimony of Senior Vice President and General Counsel Steven J. Cole before the FTC, <http://www.ftc.gov/bcp/icpw/comments/bbbonline.htm>.

direction of a settlement) to very formal decision-making processes, such as arbitration.² Each "type" of dispute resolution, in turn, may have multiple subsets.

For example, arbitration is considered a type of alternative dispute resolution. However, there are models for "mini-trial" arbitration, binding arbitration, non-binding "advisory" arbitration, "conditionally binding" arbitration (binding when accepted by one or both parties), "med/arb" (mediation that turns into an arbitration decision if the parties don't reach a settlement during mediation) and "final offer" arbitration (just to name a few). There are arbitrations before single arbitrators or before panels of arbitrators, arbitrations that are intended to take many months to conclude and expedited arbitrations where cases are intended to be concluded in days or weeks. Some arbitrators have extensive subject matter expertise about a particular industry or problem; others have none.

Harvard Professor Frank Sander coined the expression, "let the forum fit the fuss" to describe a "multi-door" approach to dispute resolution. Instead of a "one size fits all" courthouse with a single door, Sander's model envisioned that the parties and knowledgeable program/court administrators would make informed choices based on an analysis of the nature of the dispute(s), selecting from all the various dispute resolution "doors" the one model best suited to the individual dispute.

Like Sander, the BBB does not believe there is one "best type" of dispute resolution for online transactions. We support efforts to establish "fairness" standards for dispute resolution mechanisms and methods for "certifying" that mechanisms continue to meet these standards. However, we would strongly discourage regulatory efforts which might cast one "best" process in regulatory cement, limiting the ability for new mechanisms to creatively respond to technology or marketplace changes, so long as those innovations are not in conflict with the "fairness" standards.

In our comments, CBBB will draw on its more than 85 years of experience in the field of consumer dispute resolution, offering suggestions which we hope will help further illuminate this topic.

2) Under what circumstances is ADR used to resolve disputes about consumer transactions today? How does ADR work in such cases? How are decisionmakers or mediators selected under an ADR program? What lessons can be taken from such a mechanism?

² The BBB system generally classifies dispute resolution in three very broad categories. "Conciliation" is the least formal, and involves the intervention of BBB staff as a "go-between" attempting to promote voluntary settlement by the business. "Mediation" is generally the term used by the BBB to refer to more active intervention by a trained neutral designed to promote voluntary agreement on the issues and remedies by the parties. It may be face-to-face and it may include separate meetings with the parties. "Arbitration" is the term we used for formal "hearings" conducted by a trained neutral, the result of which is a written decision making factual findings and a reaching a decision on the merits based on legal principles, a voluntary code of conduct, and/or principles of "equity" or fairness. See generally, <http://www.bbb.org/complaints/medrule.asp>.

The BBB system has historically been the largest provider of consumer dispute resolution in the United States. Approximately 2.7 million consumers contacted the BBB in 1998 about a problem arising from a consumer transaction, and more than 458,000 of those consumers filed a formal, written complaint with the BBB for resolution through one of the BBB dispute settlement models.³ These figures do not include BBB AUTO LINE, an informal dispute resolution program for vehicle warranty disputes, which received more than 32,000 complaints in 1999 and has handled well over 1.6 million complaints since 1982.

The BBB uses an escalating system of complaint handling to resolve consumer disputes, attempting to resolve each case at the lowest practicable level. A majority of all consumer complaints are resolved within a 20-day period through a mail exchange of written correspondence between the parties, using the BBB as an intermediary.

There are several common reasons for the BBB system's success at handling cases at this lowest level. First, the BBB has a near-100% name recognition among North American businesses; complaints routed to companies under the BBB letterhead receive attention. Second, the BBB is most often directing customer complaints to the specific person within a company who is empowered to make decisions on consumer complaints; this facilitates settlements. Finally, BBB reports on businesses are based to a large degree on how a company handles its complaints; this provides yet another incentive for a company to give careful consideration to individual consumer complaints.⁴

If a complaint cannot be resolved at the "conciliation" level, a simplified telephone "mediation" process is used in many cases. Through this process, BBB staff -- often augmented by community volunteers -- attempt to help the disputing parties arrive at a settlement that both agree is acceptable.

³ An increasing number of those complaints are filed online. See <http://www.bbb.org/complaints/forms.asp>. Preliminary statistics for the year 1999 show that approximately 24% of formal consumer complaints received by BBBs were filed on the Internet through the BBB's online complaint form. However, most Bureaus noted an upsurge during December (28-30%) and a continuing increase during January, 2000 (30-36%). The BBB website (<http://www.bbb.org>) was first introduced in 1995, and the BBBOnLine website (<http://www.bbbonline.org>) was introduced in 1997.

⁴ Better Business Bureaus in the United States and Canada handle in excess of 25 million individual consumer contacts each year (based upon 1998 statistics), and more than one-half of those contacts are from consumers requesting the Bureau's report about a business.

If these less formal efforts fail, the BBB has a number of more formal programs through which different types of complaints may be handled. These include face-to-face mediation in some BBBs and one or more types of arbitration programs in all BBBs.

All of the BBB formal dispute resolution programs share some basic characteristics. All provide basic due process rights to participants. All are geared towards creating a "level playing field" for parties who are not experienced in ADR; BBB materials go to great lengths to explain procedures in layman's terms and provide advice for those who have not previously participated in ADR. All BBB formal programs offer a variety of means by which the parties may participate – in person, by telephone, in writing, or by a combination of those methods.

Mediators are randomly selected by the BBB program administrator from a pool of BBB qualified mediators. Arbitrators are either randomly selected by the program from a pool of certified arbitrators, or the parties are given the opportunity to rank potential arbitrators and the highest common choice is selected.

BBB formal dispute resolution programs include both local programs that primarily address disputes between businesses and their local customers and national programs that address disputes between businesses and customers that may be located a considerable distance away from each other.

Most BBB formal dispute resolution programs are based on a contractual commitment between a business and either a local Better Business Bureau (local program) or CBBB (national program). That contractual commitment obligates the business to participate in mediation and/or arbitration if the consumer is willing to do so.

One example is the **BBB CARE_{sm} Program**, in which participating companies sign a formal agreement with the BBB agreeing to participate in good faith in mediation and arbitration upon the request of a consumer. The BBB publicly identifies these "precommitted" companies in reporting to pre-purchase inquirers. The customer is not obligated to use BBB arbitration and may instead seek other forms of redress; however, if the customer agrees to use BBB arbitration, the business must also arbitrate. In BBB CARE, the arbitrator's decision is legally binding on both parties. See BBB Rules of Arbitration (Binding), <http://www.bbb.org/complaints/bindarb.asp>. Nearly 1,800 cases were decided by BBB-trained volunteer arbitrators in these types of binding programs during 1999.

Another example is the BBB system's **Membership Identification Program ("MIP")**, under which BBB members are authorized to advertise their membership only if, among other things, they agree to participate in an informal dispute settlement (IDS) program. IDS, modeled after the FTC's rule 703, provides conciliation, and/or mediation, and results in an arbitration if those other techniques do not succeed. Decisions are non-binding in the sense that they may not be reduced to a court

judgment under the various state and federal arbitration laws. However, members are required to exercise "good faith" in determining whether to comply with a decision, and membership can be revoked if they do not. See BBB IDS Rules, <http://www.bbb.org/complaints/idsrules.asp>.

The BBB AUTO LINE Program provides dispute resolution for consumer warranty disputes relating to motor vehicles. BBB AUTO LINE operates under Federal warranty legislation and Federal Trade Commission rules for Informal Dispute Settlement Procedures (16 C.F.R. Part 703). After a claim is filed, BBB AUTO LINE attempts to mediate a settlement of the dispute. For cases that are not settled, BBB-trained arbitrators conduct hearings in local BBB offices. The program provides for impartial technical inspections (when requested by the arbitrator) at no cost to the consumer. BBB arbitrators often inspect or test drive vehicles as a part of the hearing process. The arbitrator's decision is not binding on the consumer unless the consumer formally accepts the decision. Upon the consumer's acceptance, both parties are bound to carry out the terms of the decision. See BBB AUTO LINE Rules, <http://www.bbb.org/complaints/autorules.asp>. Under FTC rules, a decision must be delivered within 40 days after the case is opened. Last year, over 32,000 consumer cases were filed with BBB AUTO LINE, and nearly 6,000 cases were decided by BBB arbitrators. This year, the program will expand to Puerto Rico and the U.S. Virgin Islands.

It is important to note that, in most BBB AUTO LINE cases, the consumer appears at the hearing in person and the manufacturer participates by telephone from a distant location. BBB AUTO LINE relies on document imaging technology, and documents submitted as evidence are electronically imaged and can be electronically viewed or transmitted.

While BBB AUTO LINE does not operate in Canada, a number of the Canadian BBB offices participate in the Canadian Motor Vehicle Arbitration Plan (CAMVAP), which is in many respects similar to the BBB AUTO LINE program in the United States. In 1998, CAMVAP processed almost 500 cases, of which over 300 were decided in arbitration.

The BBB has other national programs to address consumer disputes in specific areas. These include the **Better Business Bureau Manufactured Housing Informal Dispute Resolution Program** for manufactured housing disputes (providing for mediation and/or non-binding arbitration) and a binding arbitration program to resolve certain disputes in the **Household Goods Transportation** field. All of these programs follow similar "due process" standards and permit a hearing to be held between a consumer in one location and a business located somewhere else.

If a complaint involves online privacy policies, the **BBBOnLine Privacy Seal** program will accept the complaint (whether or not the company is a BBBOnLine seal holder). Operating under a set of dispute resolution rules similar in many respects to

those of the Better Business Bureau's National Advertising Division (NAD)⁵, BBBOnLine staff consider alleged violations of a company's posted privacy policies and (if appropriate) the BBBOnLine privacy standards to determine whether policies have been violated and, if so, what corrective actions must be implemented. Like the NAD process, consumers or companies may appeal an adverse ruling to a review panel. If a company fails to participate in the dispute resolution process or fails to abide by a decision, BBBOnLine will make a referral to the appropriate regulatory agency. In addition, if the company holds a BBBOnLine Privacy Seal, BBBOnLine must commence a process to withdraw the company's use of the seal. See Privacy Dispute Resolution Rules, <http://www.bbbonline.org/download/DR.PDF>.

There are several important lessons to be drawn from the BBB experience:

- Consumers will make extensive use of informal dispute resolution processes, particularly when the process is seen to be credible.
- It is important that consumers be given enough information to make a fully informed, voluntary decision to enter a binding arbitration process.
- Participation in a dispute resolution program is encouraged when the process can accommodate parties from geographically different areas and operate at little or no cost to consumers.
- Enforcement of arbitration awards is generally not a problem when there is the possibility of public disclosure of a business' noncompliance with an arbitrator's award, or loss of "trustmark" status for noncompliance.

3) What ADR programs currently exist for online consumer transactions? Do these programs address cross-border transactions? Please describe these programs and how they work. In describing the programs, please address issues such as fairness, effectiveness, affordability, accessibility, and due process concerns.

⁵ The **Better Business Bureau's National Advertising Division (NAD)** conducts a formal fact-finding process and issues a decision for complaints involving the truth or accuracy of a national advertising claim. Most national advertisers both participate in the NAD process and voluntarily abide by NAD decisions. Advertisers may appeal an adverse NAD decision to the National Advertising Review Board (NARB), which will structure a formal panel of 5 members (three representatives of other advertisers, one ad agency representative and one public representative) to review the NAD decision and either affirm or reject it. The NAD program makes public the names of companies declining to participate in the process and publicly refers to the appropriate regulatory agency when a company fails to abide by a decision. See NAD/CARU/NARB Procedures, <http://www.bbb.org/advertising/nadproc.asp>. Current FTC Chairman Robert Pitofsky has called the NAD/NARB process, which is administered by CBBB pursuant to a strategic alliance among CBBB and the major advertising trade associations, ANA, AAAA, and AAF, the best example of self-regulation.

There are two well-known BBB programs designed specifically for online consumer transactions. Both are operated by *BBBOnLine* and make use of BBB dispute resolution processes.

The *BBBOnLine* Reliability Program currently includes over 4,300 "trustmark" holders engaged in online commerce, encompassing almost 6000 web sites. This is the *largest* trustmark program on the Internet. These companies are contractually committed to a set of BBB standards, which includes a requirement that the company "precommit" to BBB dispute resolution for disputes involving consumer products and services. See *BBBOnLine* Reliability Standards, <http://www.bbbonline.org/businesses/reliability/standards.html>.

The process for a *BBBOnLine* reliability dispute is identical in all material respects to the BBB CARE program discussed earlier. Settlement efforts will be conducted by either written "shuttle diplomacy" or telephone conference. If a case cannot be concluded at a less formal level, the consumer is offered the option of having an arbitration hearing. Arbitration may be either binding or non-binding. At the hearing, parties may present their cases in a variety of ways, including in-person, by telephone, or in writing. There are no restrictions regarding cross-border disputes.

The *BBBOnLine* Privacy Program makes its basic dispute resolution process available without regard to whether or not the company is a Privacy Seal participant. (The appellate process, however, is available only to *BBBOnLine* Privacy Seal participants and their consumers.) Under current procedures, the only "jurisdictional" requirement is that the dispute must involve a web site directed at least in part at United States or Canadian consumers, and disputes may be brought by consumers in other countries and/or may involve websites outside the United States. Approximately 400 web sites are covered by the program, in the US, Canada and Europe.

As the leading consumer dispute settlement organization in North America, the Better Business Bureau's rules and procedures have long embodied basic fairness principles as have those of commercial dispute resolution mechanisms, such as the American Arbitration Association. In the consumer context, we have long maintained that these fundamental fairness principles should include:

- Ready access to meaningful information about the dispute resolution process. BBB materials explain the process in a straightforward manner that is particularly helpful for those who have not previously arbitrated a case.
- Neutral, independent program administration and dispute resolvers possessing sufficient knowledge and skills to perform their duties responsibly.
- Due process hearings where the parties have the right and a meaningful opportunity to hear and comment on any evidence presented to the arbitrator.
- Dispute resolution services provided at no cost or at a low cost when measured against the value of the transaction in dispute.

- The absence of geographic, linguistic or other barriers to the fullest practical participation in the entire dispute resolution process.
- Time frames that ensure a quick resolution of the dispute, taking into account various aspects of the nature of the transaction.
- A right to have adequate representation during the process.

Visibility. Regardless of the fairness of a program's rules and procedures, a dispute resolution mechanism that is invisible is useless. In the United States and Canada, Better Business Bureaus have such a high public name recognition (nearly 100% in a 1996 Gallup Study) that consumers frequently contact the BBB with a complaint without specific knowledge that an individual company has "precommitted" to a dispute resolution program. This experience may be true for other public and private agencies in other jurisdictions. Where this is not so, the BBB system is available to provide partnership assistance.

While a public recognition quotient may be one critical key to success, it is also important that information about a mechanism be clearly available at the point of the transaction. For this reason, information about the *BBBOnLine* Reliability Program standards, including dispute resolution is available when a consumer clicks on the program seal to confirm the company's participation. Similarly, our *BBBOnLine* Privacy Program rules require that a participant's privacy policy must inform the public of the firm's participation in the *BBBOnLine* Privacy Program and provide a means (usually a hyperlink) through which consumers can obtain additional information or raise a concern.

Federal Trade Commission rules recognize the critical importance of the visibility of a dispute mechanism in resolving warranty disputes. FTC Rule 703 requires that a warrantor make basic disclosures (including the name and address or toll-free number of the mechanism) on the face of a warranty to disclose the availability of a dispute resolution mechanism incorporated in a consumer product warranty. Further, the FTC requires that warrantors take additional steps to inform consumers about the availability of the mechanism at the time a warranty dispute arises.

Accessibility. A mechanism that is not visible could hardly be considered accessible. However, there are many other proven barriers to access that must be considered. First among these may be cost. If there is a cost to the consumer for using the dispute resolution mechanism, that cost will increasingly hinder consumer access as the cost of the dispute resolution approaches the value of the issue(s) in dispute. In the United States, there have been several recent examples (generally in the context of pre-dispute, binding arbitration clauses incorporated into consumer contracts) where courts have held that the costs and filing fees of the arbitration process were unconscionable when measured against the cost of the product.

The Better Business Bureau believes that consumer dispute resolution services should be provided at low or no cost to consumers. Otherwise, given the relatively low

dollar value of many issues in dispute, fees would prove a significant barrier to meaningful redress.

It is important to note that "low or no cost to the consumer" does not mean that a dispute resolution mechanism is without cost. A mechanism must be adequately funded at a level sufficient to ensure that it is capable of fully meeting its obligations to the parties. As recognized by the U.S. Federal Trade Commission in its warranty regulations, that invariably means business funding. Because of business funding, it is important that steps be taken to ensure impartiality of the mechanism, both in appearance and in fact. Without business funding, free/low cost quality consumer dispute resolution processes are unlikely to exist -- to everyone's detriment.

In addition to cost, there may be a number of other barriers to access. These would include such issues as cumbersome case filing procedures, slow (or no) response to consumer inquiries and timeliness in the handling of cases after filing (see below). In the global context, there are additional barriers that must be addressed and overcome. These include language, custom and time zone differences.

Finally, accessibility requires flexible procedures that allow the parties to present their cases in a variety of ways. While the Better Business Bureau system believes that in-person oral hearings are the best way to provide the parties with due process rights and the opportunity to fully present their case, that may not be practical for disputes involving relatively small amounts and/or a business and consumer that are located at a great distance from each other. Adequate accessibility may require hearings that can be conducted online, in writing, by telephone conference, or by a combination of those methods.

Timeliness. At a time when courts in the United States often have multi-year waiting lists before cases even appear on a docket, one of the major advantages of alternative dispute resolution in the consumer context is its potential to handle cases in a timely manner. However, if a dispute resolution mechanism, by design or through mismanagement, routinely delays the ultimate resolution of cases, consumers will become discouraged. Either the issue in dispute is no longer material (in the extreme case, the consumer is deceased) or the consumer withdraws from the process.

BBB binding arbitration rules provide that cases will generally be concluded within 60 days of filing. BBB AUTO LINE Rules provide for case handling within 40 days; this shorter time frame is required by FTC's Rule 703, which mandates that dispute resolution mechanisms incorporated into a warranty issue a decision on a case within 40 calendar days of the date that the claim was formally filed with the warrantor's mechanism. The 40 calendar days is very expeditious in the "brick and mortar" world, and in fact in many cases does not permit sufficient time for the parties to pursue mediation efforts to resolve the case short of an arbitration hearing. Given the well-accepted benefits of mediation, which provides a "win-win" for both parties, it is important to allow time for mediation in any dispute resolution mechanism. With the much more "instantaneous" nature of e-commerce, it is reasonable to believe that

consumers will expect faster case-handling times in the future. We believe this will require that online dispute resolution programs make significant investments in technology to meet user expectations under Internet time frames, although care must be given to ensure that there is adequate time allowed to permit reasonable mediation efforts and to allow full participation by the parties.

4) Does this ADR program provide information to a consumer before he or she is asked to agree to submit disputes to the program? At what point and how is this information provided?

All BBB dispute resolution programs provide extensive information to consumers. For example, the BBB AUTO LINE program provides consumers with a copy of the brochure *How BBB AUTO LINE Works*, <http://www.bbb.org/complaints/howalw.asp>, which includes a detailed description of how the program operates and the rules of arbitration. In addition, the consumer receives a *Program Summary*, which details each participating manufacturer's specific commitments to the process, along with a copy of the standards and remedies of that consumer's state "lemon law" if appropriate. The accompanying correspondence informs the consumer of the name and toll-free telephone number of the BBB case specialist handling the case, so the consumer can obtain additional information. At each step in the dispute resolution process, the correspondence and additional material provides further information about how the process operates.

Similar information is available through local BBBs and in other CBBB national programs.

We recognize that, with increasing frequency, businesses are including arbitration clauses in consumer contracts to require that all disputes with the consumer be resolved in binding arbitration. The Better Business Bureau system has developed protocols that govern these types of contractual clauses if they require the consumer to arbitrate through the Better Business Bureau system. In addition to a separate sign-off for the arbitration clause and clear disclosure that the consumer is giving up the right to go to court, the protocols require identification of the arbitration program, disclosure of any fees involved, a statement of the standards used in decision-making, and a phone number that consumers may use to receive additional information about the program.

5) What are the procedural effects of this program? For example, to what extent are decisions binding? To what extent are they appealable for a decision? Is participation in the program a prerequisite to filing a lawsuit?

As discussed earlier, some BBB decisions are binding (e.g., BBB CARE), others are "conditionally binding" (e.g., BBB AUTO LINE), and still others are not

binding on either party⁶ (e.g., program for manufactured housing disputes). The rules governing binding and "conditionally binding" decisions contain very limited grounds under which the parties may seek further review by the arbitrator after the decision has been rendered. These rules provide that an arbitrator may "clarify" a decision if the directed action is unclear in some respect. Arbitrators may also entertain applications to "correct" a decision if there is a "mistake of fact" (an error in the date, time place or name of something included in the decision) or a "miscalculation of figures" (adding up a column of figures and obtaining an incorrect answer). Parties may also seek review if the decision is impossible to perform. Other than these grounds, there is no post-decision internal appellate process. Parties may, of course, seek limited review under the Federal Arbitration Act or state arbitration acts.

As noted earlier, both the NAD advertising review process and the BBB*OnLine* Privacy Program process provide for an appeal to a review panel.

The only time that participation in a BBB program is a prerequisite to filing a lawsuit is where such participation is required by law or a court -- or by mutual agreement of the parties. Under the Magnuson-Moss Federal Warranty Act, for example, a warrantor may require participation in BBB AUTO LINE prior to the consumer filing a lawsuit under the Federal warranty law.

6) How are decisions enforced under this ADR program?

There are many different, and quite effective, ways that decisions are enforced under BBB programs.

If a participant in the BBB CARE or MIP program fails to honor a duly rendered arbitrator's decision, the company's membership in the BBB will be revoked. Further, the fact that the company had failed to honor a decision is made a part of the company's BBB reliability report and made available to consumers making pre-purchase inquiries. Most BBB offices also issue press releases regarding such "revocation of membership" actions. If necessary, a local BBB may work with a consumer to obtain judicial enforcement of a decision under the appropriate arbitration act.⁷

In a similar vein, the BBB*OnLine* Reliability Program would revoke a participant's online seal for non-compliance.

⁶ In non-binding programs, the business is committed to acting in good faith in determining whether, and to what extent, it will comply with an adverse decision.

⁷ As discussed earlier, most BBB programs involve a contractual precommitment on the part of the business to participate in arbitration. The Better Business Bureau's agreement with businesses in the BBB CARE program provides certain protections, including agreement by the business to pay a consumer's attorney fees if it becomes necessary to have an award enforced in court.

While the Federal Trade Commission only requires warrantors to inform consumers whether and to what extent the company will comply with a decision of the mechanism, some states impose severe penalties under their "lemon laws" for failure to abide by decisions. The FTC rules do require a warranty dispute resolution mechanism to keep records of each instance where a warrantor failed to honor a decision and require the mechanism to note such instances in an annual external audit that must be provided to the FTC as well as in statistics available to the public.

7) What are the costs to the parties engaging in ADR? Who funds these costs? Is this program cost-effective? Is it suitable for small-dollar transactions? Does this program handle a large volume of disputes? Is it capable of doing so?

No national BBB programs charge consumers any participation fees. Local BBB programs generally do not charge consumers to participate, although a few have a nominal filing fee (less than \$50). Consumers are responsible for their own expenses (most often either attorney's fees or costs of obtaining some specialized evidence) in connection with a dispute resolution process.

As discussed above, businesses fund the costs for these programs.

As described above, BBB programs successfully handle a large volume of disputes. A significant number of those disputes are "small-dollar," although many involve five figure and even six figure amounts in dispute.

8) Is ADR for online consumer transactions better suited to certain situations than others, for example, cross-border disputes or cases limited to a certain monetary amount? Are there any other factors relevant to determining whether ADR is suited to particular online consumer transactions?

Once again, no single ADR "model" is best suited for all types of online consumer transactions. The goal must be to encourage the development of many different models, uniquely suited for different types of disputes.

There are a number of distinct issues that will ultimately need to be addressed. However, from our experience, coupled with our growing understanding of a number of related issues, we believe the following concerns -- many of which are strongly linked -- will need to be addressed immediately:

- **Volume.** Most dispute resolution mechanisms, including the courts, rely on a system of barriers (however benign) to retard entry and encourage resolution at lower levels. If one assumes that an online, global consumer dispute resolution mechanism exists, that it meets the requirements for accessibility and visibility, that it is fair, impartial and trusted by consumers and that online merchants have pre-agreed to use such a mechanism, then the Internet eliminates most traditional barriers. It may be difficult and time consuming -- in cases where it is even

geographically possible -- for a consumer to go down to a small claims court, pay a filing fee and receive a date upon which to return and argue a case. However, for the investment of a few minutes of time online, a consumer can initiate a dispute resolution process without ever leaving home. Given the explosive growth of online commerce, the potential consumer complaint volume will be a major factor with which dispute resolution mechanisms must deal effectively.

- **Speed.** As we previously noted, a 40-calendar-day time frame (from complaint filing through decision) may be considered quite fast in the "brick and mortar" world, but some may consider it slow in a world where "excellent customer service" may mean responding to a consumer request in minutes or hours, rather than days or weeks. Dispute resolution mechanisms will need to find a way to deliver services within a time that is acceptable to consumers and merchants.
- **Technology.** The major solution to concerns about both volume and speed lies in adapting Internet technologies to consumer dispute resolution. Unfortunately, the low dollar value of consumer disputes, coupled with the desire to provide dispute services at low or no cost, gives little incentive for entrepreneurial investment. At the same time, the potential volume of consumer cases will require a larger investment in robust technology that can be rapidly scaled up to meet demand. We believe a partnership among governments, non-profit organizations, academic institutions and the private sector will be necessary to ensure that the technological infrastructure will be in place.
- **Language and Cultural Issues.** As online commerce transcends national borders, it crosses major language and cultural barriers as well. Without speaking another language well (or perhaps at all), a consumer from one country may be able to navigate through a well-constructed web site in another country well enough to place an online order. It is quite another matter for that customer to try and explain the complexities of his or her dissatisfaction to the company or a third party speaking his or her native language. Similarly, it may be difficult for a company or third party to understand a specific cultural context within which lies a customer's dissatisfaction with a product or service. Treating these cross-lingual and cultural issues in the consumer dispute context will be an early challenge for the construction of effective dispute resolution programs.
- **Credibility Issues.** The classic fact-finder often relies on ascertaining the veracity of witnesses by the appearance and demeanor of the parties and their witnesses -- "looking them in the eye". Such visual cues may be absent from a dispute resolution process where the parties and the neutral may be separated by several thousand miles. In any event, such cues might actually be quite misleading, since they are set in a cultural context. For example, a witness who looks another person in the eye may be considered to be truthful in one culture and may give great offense in another. Dispute resolution processes will certainly

need to take these issues into account and may need to modify procedures or find new and different methods to deal with these issues.

- **Production of Evidence.** In the "brick and mortar" world, the parties produce evidence or witnesses by bringing the documents or the witnesses with them to a hearing. In the electronic world, where documents cross continents in a nanosecond via email, it is simple to believe that evidence will be produced the same way. While that may be valid in major commercial disputes, it is unreasonable to assume that every consumer with Internet access is also a document-imaging specialist. Accordingly, thought needs to be given to the means through which the average consumer may submit evidence to the mechanism (certainly not ruling out ordinary mail) and how a mechanism may obtain credible testimony from witnesses (including how and when electronic "witnesses" may be questioned).
- **Inspections.** In the BBB's consumer programs, arbitrators often conduct "on site" inspections of a product or service that is the subject of a dispute. Such inspections might prove pivotal in determining whether a fault exists and, if so, where that fault lies. What types of provisions might an online mechanism make for the equivalent of such inspections? Availability of impartial inspectors that serve a program on a national or international basis may be the best way to solve this problem.

The CBBB is committed to finding the resources needed to develop a state-of-the-art online dispute resolution program that is technologically efficient and consumer friendly, and we are confident that it can be done quickly.

Development of Alternative Dispute Resolution Programs for Online Consumer Transactions

9) Describe alternative dispute resolution programs for online consumer transactions that are being developed by businesses, consumer representatives or other groups.

As we've mentioned earlier, most of the newer online dispute resolution programs we are aware of fall into two broad categories:

- a) Those involving various types of commercial disputes. Under this category, we could include (among many others) such programs as the arbitration mechanism sponsored by the World Intellectual Property Organization (WIPO) for intellectual property disputes and various mechanisms such as eResolution, which are structured to deal with domain name disputes.
- b) Those being offered by for-profit vendors. These either require a filing fee from the consumer or are limited in some other way (for example, they only deal with disputes regarding participating companies -- and there are very few participating companies).

To the best of our knowledge, other than the BBB, there is no broad-based, widely recognized consumer dispute resolution mechanism, focused specifically on online disputes and available to consumers at no cost to resolve any type of marketplace dispute.

10) What are the obstacles, if any, to the implementation of alternative dispute resolution programs for online consumer transactions? What are the incentives and disincentives for businesses and consumers to use such programs?

We've already discussed some of the challenges for ADR in the online environment in our answer to Question 8. An additional problem would be enforcement of arbitration awards, particularly where small amounts of money are involved and a business has no assets within the jurisdictional reach of the consumer. Providing some means for public "exposure" of businesses that fail to honor their arbitration commitments – such as the loss of a "trustmark" or a negative Better Business Bureau reliability report – may be the best way to minimize this problem.

There are a number of ways to create incentives for business participation in consumer dispute resolution mechanisms. Perhaps most important, because the business community needs predictability and harmonization of rules applicable to cross border Internet transactions, an ADR regime that provides some relief here without years of treaty negotiations would be a strong incentive.

BBB advocates a "three legged stool as the preferred approach. First, voluntary business practice standards should be adopted by the business community to set a high denominator of online business practices without reference to the law of any particular jurisdiction. The BBB has published for comment a draft online code of best business practices, and has received more than 1000 comments so far. We expect a second draft to be published online very soon. <http://www.bbbonline.org/businesses/code/index.htm>. Second, a dispute resolution commitment from e-commerce businesses is needed, with adjudications based on the voluntary business practice standards and alternative legal remedies preserved for the few consumers who might consider court. Third, a seal or trustmark should be displayed by companies that meet these standards and dispute resolution components, to be awarded by the BBB or other respected self-regulation organization. Dispute resolution, by itself, is, to be blunt, too late. Consumers need help finding reliable companies offering the "DR" safety net *before* any damage is done.

Specific government incentives might also be helpful. As we previously noted, Federal warranty laws provide that a warrantor may require consumers to use a mechanism that complies with FTC dispute settlement rules prior to bringing a court action under the Warranty Act. Similar provisions exist in some state "lemon laws". Some state lemon laws provide relief from monetary penalties in court actions if a manufacturer participates in a certified informal dispute settlement program.

An important incentive is the fact that dispute resolution programs help disputes “go away”, and reduce the instances in which a dissatisfied consumer will discourage other customers from doing business with a company. With the potential for communication brought about by the Internet, criticism can be widely disseminated and reduction of the number of unhappy consumers has very positive benefits.

Disincentives for business can easily be created when requirements for mechanisms become so calcified or numerous that it becomes easier and more cost effective not to operate a dispute resolution program than to operate one under very constricting rules.

Incentives for consumer use are relatively simple. Make the mechanism very visible, administered by a trusted organization, available free or at a very low cost and easy to use. Consumers will come. The converse of these issues will create the major consumer disincentives -- hide the mechanism, administer it through an unknown or untrusted organization, charge relatively high access fees and make the mechanism complex. Consumer use will vary in direct proportion to the lowering or raising of these barriers.

Elements of Fair and Effective Dispute Resolution Programs for Online Consumer Transactions

13) The OECD "Guidelines on Consumer Protection in the Context of Electronic Commerce" encourage businesses, consumer representatives and governments to "work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost of burden to the consumer." What are some steps that could be taken to implement this principle? How can issues such as those raised in questions 4 through 7 (above) be considered in this context?

The Federal Trade Commission's work in this area is an important first step. After input is developed through the FTC's efforts, it would be beneficial to establish a working group that can help deal with creating the necessary legal framework for successful dispute resolution options. At the same time, businesses should be working with ADR organizations to foster increased participation in such programs. The code of online business practices under development by the BBB closely follows OECD criteria, including the dispute resolution provisions. See <http://www.bbbonline.org/businesses/code/draft/principle4.htm>.

14) What issues are raised or created for ADR, if any, by online consumer transactions that do not exist in the traditional, offline environment?

Issues raised by online consumer transactions are, in many respects, similar to those raised with mail order businesses or telemarketers. The Internet, however,

presents a potential for easier access and greater volume of commerce and can thus affect a greater number of consumers.

Online consumer transactions are more likely to involve situations where the consumer may have little tangible information about a business, including where the business is located or who owns/operates it. Consumers may not know where to direct complaints, and any available dispute resolution options must be well publicized.

Role of Governments

15) What should be the role of governments, if any, in connection with the use and/or development of alternative dispute resolution programs for online consumer transactions?

We believe that consumer dispute resolution mechanisms will operate best in the context of a larger, industry self-regulation context. Consumers and businesses need a common understanding of the standards that should govern electronic commerce.

Consumers need access to fast, fair, effective methods of resolving consumer disputes when they believe a business's performance is at variance with the common standards.

Finally, we believe that consumers need quick, meaningful ways of identifying those companies that subscribe to high standards for e-commerce, including participation in meaningful dispute resolution programs.

We believe that thoughtful government oversight and enforcement provides a necessary fertile medium in which these comprehensive online self-regulatory programs can flourish.

Accordingly, we believe that the role of governments, in the framework of cross-border consumer protection, should be:

- To agree upon a set of international "standards" for consumer dispute resolution programs;
- To give some formal "standing" or "certification" to "trustmark" programs which meet these standards. Recent "safe harbor" negotiations are one example of how government can create positive incentives for self-regulation;
- To provide reciprocal, uniform audit mechanisms to ensure citizens of their respective jurisdictions that "trustmark" programs live up to their commitments. For consumers, finding reliable "trustmark" programs will be as important as finding reliable companies. This will be particularly true where trustmark organizations are new and not recognized by consumers and businesses;

- To use the force of local laws and regulation to aggressively pursue those companies that fail to live up to their commitments, abuse the system or engage in fraudulent or deceptive acts or practices.

Workshop

17) What should be the primary focus and scope of the public workshop on alternative dispute resolution for online consumer transactions?

The focus and scope should be identifying and resolving any legal framework issues, developing baseline “safe harbor” standards that can be used for online commerce dispute resolution programs, and methods to encourage the widespread use of dispute resolution programs by business.

18) Are there any other interests not previously described in this notice that should be represented at the workshop?

There is one significant policy issue not previously addressed in this document, but which will require attention. Companies in the United States have a long history of incorporating binding arbitration provisions into commercial and union/management contracts. Courts recognize the validity of these pre-dispute agreements and have upheld them routinely. Over the past decade, however, there is a growing movement toward incorporating such clauses in consumer contracts. This has become a highly charged, controversial issue.

The European principles (under its category of “liberty” within a binding dispute resolution process) address the issue of the voluntary nature of arbitration, attempting to ensure that the consumer has knowingly and freely chosen to elect to bind him/herself to a mechanism’s decision. Under the European Principle, a consumer’s election to arbitrate may not be the result of a commitment prior to the actual disputing arising.

In a related context, the Better Business Bureau system has established a *Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments*. Recognizing that courts in the U.S. have generally upheld these clauses, with restrictions, the BBB policy sets protocols under which a business may name the BBB in one of these clauses. See BBB Policy for Voluntary Consumer/Business Arbitration in Contractual Commitments, <http://www.bbb.org/complaints/arbclaus.asp>.

We believe that the issue of such pre-dispute binding clauses in cross-border disputes will need to be addressed.

Sincerely,

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